

1 UNITED STATES BANKRUPTCY COURT

2 SOUTHERN DISTRICT OF NEW YORK

3 CASE NO. 08-13555-scc

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5 In the Matter of:

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7 LEHMAN BROTHERS HOLDINGS INC.,

8

9 Debtor.

10 - - - - - x

11 U.S. Bankruptcy Court

12 One Bowling Green

13 New York, New York

14

15 March 24, 2017

16 10:03 AM

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18 B E F O R E :

19 HON. SHELLEY C. CHAPMAN

20 U.S. BANKRUPTCY JUDGE

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25 ECRO - KAREN

1 HEARING RE: Doc #53107 Plan Administrators Five Hundred
2 Nineteenth Omnibus Objection to Claims (No Liability Claims)

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25 Transcribed by: Sheila Orms and Dawn South

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P R O C E E D I N G S

THE COURT: Please have a seat.

How is everyone?

ALL: Very good, Your Honor.

THE COURT: Okay. Who am I going to hear from?

MR. LEVINE: Thank you, Your Honor, Richard Levine
from Weil Gotshal for LBHI as plan administrator.

THE COURT: Okay.

MR. LEVINE: Your Honor --

THE COURT: You know, I'll say my usual, I've read
the papers, but in light of the degree of complexity for the
-- although you say it's not complex, but in light of the
sheer volume of the different arguments, I'm happy to let
you make whatever presentation you like and the same goes
for the Maverick parties.

MR. LEVINE: Thank you, Your Honor.

So, as you know, we believe that if we are right
about the application of Section 562, then our motion should
be granted in its entirety so that will be my focus. But
I'd like to start, Your Honor, with the Maverick LBIE
settlement.

The first thing I'd like to read from is --

THE COURT: Can I ask you one --

MR. LEVINE: Sure.

THE COURT: -- overarching background question.

1 MR. LEVINE: Sure.

2 THE COURT: So this is all came in the first round
3 incident to the estimation motion.

4 MR. LEVINE: That's right.

5 THE COURT: Okay. So in terms of, you know, given
6 that we're at an advanced point in the case, and this is not
7 dispositive in any way, it's just information for me, are
8 there other similar claims structurally similar claims that
9 have been allowed or disallowed either with respect to an
10 LBHI guarantee of a levy obligation or LBIE obligation or an
11 LBHI guarantee of an LBI obligation? And if you don't know
12 the answer that's fine, as a legal matter it's neither here
13 nor there, it's just information.

14 MR. LEVINE: I'll defer to Mr. Fail on that. But
15 it's my understanding that no, that there were two of these
16 "Libby" guarantee claims, SRM, which we argued to Your Honor
17 last summer and then mediated and then this one, where there
18 were among the few Libby guaranteed claims that were
19 withdrawn from the estimation objection.

20 Most of the Libby guarantee claims were resolved
21 with the estimation objection and you estimated at zero
22 because Libby was being a hundred percent payout. There
23 were only a handful --

24 THE COURT: Payor, you said, payor.

25 MR. LEVINE: Right, so Libby was paying a hundred

1 percent on claims. So it was only a few guarantee claims
2 against LBHI that had settled with Libby before they knew
3 that Libby was going to be a hundred percent payor who
4 objected to the estimation motion.

5 The estimation motion was withdrawn as to those
6 claims because we wanted to get rid of the vast majority
7 where there was no objection, so there was only a handful
8 that survived.

9 And as far as I know, the only one outstanding is
10 SRM and Maverick. SRM is a little bit more complicated
11 because it's governed by UK law, remember we don't that
12 makes a difference --

13 THE COURT: I remember, right.

14 MR. LEVINE: -- but it does, it did require both
15 sides to be in those horrible English expert law
16 declarations --

17 THE COURT: I wouldn't agree with the
18 characterization as horrible, but.

19 MR. LEVINE: Well, they're not written in American
20 English for sure.

21 THE COURT: No comment.

22 MR. LEVINE: Garrett, do you want to add anything
23 to add?

24 MR. FAIL: Yeah, thank you, Your Honor, Garrett
25 Fail.

1 THE COURT: Yes, Mr. Fail.

2 MR. FAIL: Your Honor, is correct, there are a
3 number of claims that are still outstanding on -- of Libby
4 guarantees, guarantees by LBHI of Libby primary obligations
5 that are subject to a motion to estimate claims. There's
6 essentially two parties that are still outstanding with
7 those, the number of claims that they have acquired, but
8 there's only two parties there.

9 These -- the two that Mr. Levine referenced SRM
10 and Maverick are the only two in the claims objection where
11 LBHI filed an objection because the parties are asking for
12 more than they -- they're looking for no more than --

13 THE COURT: The notion on that are the primary
14 obligation at Libby.

15 MR. FAIL: Exactly. And I'm not aware of any L
16 claims against LBHI where the primary obligation was LBIE
17 that have been allowed by LBHI.

18 THE COURT: Okay. All right. Thank you.

19 MR. LEVINE: So what I was going to -- since our
20 focus is on 562 --

21 THE COURT: Right.

22 MR. LEVINE: -- and I'll get to the legal issues
23 there in a few minutes. I thought what I'd like to do is
24 start with the key elements, which we think allow us to win
25 if 562 applies.

1 The first is a statement in Maverick's objection
2 to the estimation motion which I don't think, you know, by
3 any means they're walking away from. Your Honor doesn't
4 need to read along with me, but if you want to --

5 THE COURT: I have it. I have tab 4.

6 MR. LEVINE: Tab 4.

7 THE COURT: Tab 4, yes.

8 MR. LEVINE: Page 11, paragraph 22, and I'm
9 reading the second half of the paragraph about five lines up
10 from the bottom.

11 And this is their statement, and again I don't
12 think it's --

13 THE COURT: Hold on, tab 4 -- sorry.

14 MR. LEVINE: No problem, tab 4, page 11.

15 THE COURT: Page 11, yes.

16 MR. LEVINE: Paragraph 22.

17 THE COURT: The Ivanho rule.

18 MR. LEVINE: On paragraph 23, sorry, next
19 paragraph, I can't read my numbers. So if you go about
20 halfway or three quarters of the way down that paragraph,
21 the last sentence begins towards the right-hand column "in
22 light of the cancellation."

23 THE COURT: Yes.

24 MR. LEVINE: So this is their statement "In light
25 of the cancellation of indebtedness that would otherwise

1 have been owed to Libby, Maverick concedes that it already
2 has effectively received approximately 101.9 million in
3 value from Libby, in connection with the Libby settlement
4 agreement, reflecting an offset of the approximate value of
5 the securities and cash that Libby may have been obligated
6 to return to Maverick under English law."

7 So that's our first kind of point, which is that
8 if we're right, that the settlement, and it wasn't exactly
9 the settlement but for purpose of the estimation motion,
10 we're using the date and the valuation that they assert,
11 they got the value of their cash and securities as of the
12 settlement date under the settlement.

13 So that's a valuation date, they got what they're
14 entitled to. As we understand their argument, they say, no,
15 you use the petition date.

16 THE COURT: They say you use the petition date --

17 MR. LEVINE: Right.

18 THE COURT: -- for the purpose of the guarantee.

19 MR. LEVINE: Of valuing, right, of valuing the
20 claim.

21 THE COURT: For the purpose of asserting a claim
22 on the guarantee.

23 MR. LEVINE: That's right. Then the second thing
24 that I wanted to bring out is actually in the settlement
25 agreement itself, so that is behind tab 4, now we're going

1 to tab E behind tab 4, which is the Libby settlement --
2 settlement between Libby and Maverick.

3 THE COURT: Yes.

4 MR. LEVINE: And there I'd like you to turn to
5 page 4 --

6 THE COURT: Okay.

7 MR. LEVINE: -- of the settlement. And it's
8 actually part of -- it's 2.1.A, and this is where it
9 provides for termination, the relevant agreements and
10 they're actually in Schedule 2 to the settlement, and they
11 list all the agreements at issue, the prime brokerage
12 agreements, the marginal lending agreements, and the global
13 mass of secured lender agreements, so they're all listed in
14 Schedule 2 and then defined as the relevant agreements.

15 The relevant agreements and all transactions
16 thereunder, to the extent that they have not previously been
17 terminated are terminated as between Libby and each Maverick
18 entity.

19 And I will tell Your Honor that we saw in
20 discovery any documents suggesting an earlier termination,
21 and you'll remember they actually served the notice of
22 termination, but Maverick was like most Libby claimants,
23 they didn't serve a notice of termination, so there was no
24 prior termination.

25 And I don't understand them to be arguing there

1 was a prior termination.

2 THE COURT: No, I think in this point their
3 argument is that essentially it doesn't matter because the
4 words say that they're terminated as between LBIE and each
5 Maverick entity and therefore that does not affect the
6 obligations of LBHI and therefore, it does not implicate or
7 mean that 562(a) is controlling.

8 MR. LEVINE: Right and --

9 THE COURT: And in response to this, you say,
10 well, look all the obligations --

11 MR. LEVINE: I can sit down.

12 THE COURT: All the obligations are terminated, so
13 the fact that these words limit it to LBIE, is neither here
14 nor there.

15 MR. LEVINE: Right. I mean, that's exactly right,
16 it's really those three arguments you were just hinting at
17 that LBHI was not a broker dealer. LBHI could not form the
18 prime brokerage functions, in fact, in the prime brokerage
19 agreement it expressly provides that a prime brokerage
20 account, the opening words are "a prime brokerage account
21 open pursuant to this agreement will be opened at Lehman
22 Brothers, Inc."

23 And so clearly Lehman Brothers, Inc. was the prime
24 broker that, in fact, it was Libby but it had to be either
25 LBI or Libby --

1 THE COURT: Sure.

2 MR. LEVINE: -- because LBHI was not a broker or
3 could not trade for customers, could not custody --

4 THE COURT: Could not custody --

5 MR. LEVINE: -- security or cash. So that in
6 terms of the obligations on the Lehman side on the -- under
7 the prime brokerage agreements, it was terminated as to
8 Libby, there was nothing left for LBHI to do. LBHI was
9 technically a party and benefitted from things like
10 exculpation provisions, but it didn't have any obligations
11 because it couldn't interact with customers.

12 Secondly obviously to the extent that their claims
13 are guarantee claims, and under the proof of claim, and
14 we'll look at that in a moment, I'm not sure you're going to
15 pull one out, all the claims are guarantee claims.

16 THE COURT: They're guarantee claims.

17 MR. LEVINE: So if they're guarantee claims --

18 THE COURT: Right.

19 MR. LEVINE: -- and the primary claims are against
20 Libby and it's been terminated as to Libby, and the only
21 question is whether Libby owes them something as to which
22 we're guarantor. Well, I don't think it matters whether it
23 was terminated as to LBHI when, to the extent their claims
24 are a guaranteed claim.

25 THE COURT: And I think finally the argument would

1 be that if, in fact, it was not terminated as to LBHI, so
2 that there were still somehow leaning obligations of LBHI
3 after the Libby/Maverick settlement, then it was an
4 executory contract and it was rejected pursuant to the plan,
5 and that was just about the same date as the settlement, the
6 effective date of the plan, so it was rejected and 562 would
7 still apply.

8 So that's our response to the argument that it
9 wasn't terminated as to LBHI. So if we are right that
10 Section 562 controls, then we think there's no room to
11 argument, no room to argue, other than as of that date, the
12 contracts were terminated, the security contracts, the
13 master agreements were terminated and they got full value.

14 Now, as I understand Maverick's main theory it's
15 very different. The main theory is that the value of their
16 long positions, and they say you don't take into account the
17 short positions, the offsetting short positions, you just
18 look at their long positions, to decrease from the petition
19 date which is they say when you value it, 562 doesn't apply,
20 to the settlement date by 16.2 million. And that they're
21 entitled to that diminution in value from petition date to
22 settlement date because all they were able to get from Libby
23 is the value at the settlement date, and not the value at
24 the petition date.

25 Of course, we think well, it doesn't matter what

1 the value is of the petition date, but that's their argument
2 as I understand it.

3 THE COURT: Well, in support of that argument,
4 they say, for example, if for some reason, their claim
5 against LBHI would have had to have been valued prior to the
6 settlement date, you would be stuck with valuation as of the
7 petition date.

8 MR. LEVINE: Well, I -- that may have been true,
9 but the -- once they terminated their contracts, 562 kicks
10 in. I mean, 562 --

11 THE COURT: 562 kicks in not only with respect to
12 the termination of the prime brokerage agreement, but also
13 with respect to the guarantee agreement.

14 MR. LEVINE: Right, for multiple reasons. Number
15 one, we think the guarantee agreement under the definition
16 in the Code in Section 741 --

17 THE COURT: Is the securities --

18 MR. LEVINE: -- is the securities contract, right,
19 and to the extent the prime brokerage agreement is the
20 master netting agreement, then the guarantee of the master
21 netting agreement is also a securities contract.

22 The -- I lost my train of thought, I'm sorry.

23 THE COURT: I'm sorry, my fault.

24 MR. LEVINE: So, you know, we think 562 applies,
25 but so to get these diminution damages, reduction in value,

1 and we're accepting their numbers for the motion to dismiss
2 hearing, we're not agreeing with them, we're just accepting
3 them for purposes of -- for example, they value -- their
4 settlement they value is supposedly as of February 13th,
5 2012. Because that's, according to their affidavit,
6 basically when the business deal was done.

7 Now, my guess is, is that the reason they're using
8 that day, so the actual settlement date of March 30th, 2012
9 is because it moved against them, but I don't know that, and
10 we're not challenging that --

11 THE COURT: We're not going there at a sufficiency
12 hearing.

13 MR. LEVINE: At a sufficiency hearing.

14 THE COURT: Right.

15 MR. LEVINE: We're accepting their number. So --
16 but to get those diminution damages, that 16.2 million they
17 need to establish 562 doesn't apply, they need to convince
18 Your Honor that your rulings in Stonehill, Newport, and
19 Providence and the decision of MF Global on exculpation
20 provisions precluding diminution damages doesn't apply here,
21 they're wrong.

22 THE COURT: And just to stop in the decision tree,
23 even if 562 were held not to apply, you say the exculpation
24 would kick in and would knock out the liability of LBHI on
25 the guarantee nonetheless, correct?

1 MR. LEVINE: On the diminution damages.

2 THE COURT: The diminution damages.

3 MR. LEVINE: They make an assertion that as of the
4 petition date for five of the six funds, you know, five
5 funds they chose, so we know what the sixth one would have
6 done to the number, the net amount, and this is on a net
7 basis owed by Libby to Maverick was 4.3, 4.3 million.

8 So we would say that if they're right that 562
9 doesn't apply or worst cast is a 4.3 million --

10 THE COURT: Yes.

11 MR. LEVINE: -- then we'd say, once we take into
12 account that sixth fund, it's likely -- well, we know it's
13 going to be less than 4.3, whether it's going to be any
14 positive amount, I mean, I actually know the number, but it
15 was provided in mediation so I can't say it unless counsel
16 agrees, but in the public record, we know that for five of
17 the six funds all that Libby owed Maverick as of the
18 petition date was 4.3 million on a net basis.

19 And as you know, Your Honor, we think this notion
20 that our guarantee was only of long positions and not net,
21 makes no sense. I mean, the function of a guarantee
22 obviously is to make sure that the primary obligor makes the
23 claimant whole. Right.

24 If all Libby owed to Maverick was 4.3 million
25 because Maverick owed Libby this much and Libby owed it that

1 much, it seems crazy to say that we have to pay them this
2 windfall that we don't get to take into -- well, we're
3 guaranteeing more the net amount, that they get to claim and
4 get this windfall.

5 So we think that doesn't make sense. So we think
6 that to get the 16.2 diminution damages, two of the three
7 arguments are is that 562 doesn't apply, we think they lose.
8 The exculpation provisions don't preclude the diminution
9 damages, and we think they lose the law of the case, and at
10 global. And then there's this issue of they only look at
11 their long positions, and I think that's contrary to the
12 nature of a guarantee. We think that's contrary to the
13 nature of the parties agreements.

14 Now, we made a mistake in our opening brief, we
15 cited to Your Honor the netting provision in the prime
16 brokerage agreement, which provide for netting. And they
17 correctly pointed out in their opposition that that only
18 applied if Maverick was in default.

19 But there's, you know, sometimes it's lucky to be
20 on the side of a good contract. Paragraph 32 of the prime
21 brokerage agreement, Your Honor --

22 THE COURT: What tab am I in?

23 MR. LEVINE: Okay. You are in tab 4B. Your Honor,
24 I actually have some excerpts printed out, would you --

25 THE COURT: I can -- it's easier for me to just

1 use my little tabs here. So I'm with you.

2 MR. LEVINE: 4B, and if you go to the prime
3 brokerage agreement --

4 THE COURT: So this is --

5 MR. LEVINE: 4B.

6 THE COURT: -- LBI, prime brokerage agreement.

7 MR. LEVINE: Right, the only prime brokerage
8 agreement with LBI.

9 THE COURT: Well, it says LBI.

10 MR. LEVINE: Yeah, it's with LBI, but this is the
11 one that governed the relationship, there was no separate
12 one with LBIE.

13 THE COURT: Okay. You folks agree with that?

14 MR. BELL: Correct, we do, Your Honor.

15 THE COURT: Okay. So I'm in tab 4B, and what
16 page?

17 MR. LEVINE: And if you go to paragraph 32 so
18 we're towards the end.

19 THE COURT: Numbered paragraph 32.

20 MR. LEVINE: On page 9.

21 THE COURT: Yes, cumulative rights entire
22 agreement.

23 MR. LEVINE: Right. If you go to the second
24 sentence, it's about four lines down in towards the right-
25 hand margin, "to the extent that the provisions of any

1 contracts you have with any Lehman Brothers entity, whether
2 heretofore or hereafter entered into are inconsistent
3 whether the inconsistency be within the contracts or a
4 single contract, the conflict shall be resolved in favor of
5 the provision which affords Lehman Brothers with the maximum
6 rights, remedies, benefits or protections."

7 So to the extent that the provisions of a
8 contract, a prior contract heretofore entered into are
9 inconsistent with this, Lehman gets the best provision.

10 THE COURT: Okay. And how does that help with
11 respect to the netting provision?

12 MR. LEVINE: Because if you go to our tab 3, which
13 is our reply brief, attached to our reply brief was the
14 prior prime brokerage agreement, it's Exhibit 1, it's in
15 terms of the ECF filings, page 27 of 80. Lehman Brothers
16 International Europe LBIE National Prime Brokerage
17 Agreement. At tab 3, page 27 of 80.

18 THE COURT: Yes.

19 MR. LEVINE: Okay. So if we go to page -- well,
20 I'm sure there's a page number, it's page 42 of 80, I'm
21 looking at Section 12, termination.

22 THE COURT: Yes.

23 MR. LEVINE: "Events of default," of course we
24 have to figure out what an event of default is, "the
25 occurrence of the following events with respect to a party

1 constitutes an event of default in relation to that party,"
2 the defaulting party, the other party being the non-
3 defaulting party.

4 And then we turn to the next page, 12.1D provides
5 "an active insolvency occurs with respect to the party,
6 except in the case of an active insolvency which is the
7 presentation of a petition for winding up or any analogous
8 proceeding or the appointment of a liquidator or analogous
9 officer of the defaulting party, in which case, no such
10 notice will be required, the non-defaulting party serves the
11 default notice."

12 Well, from our perspective it's clear that Libby's
13 appointment of an administrator was covered by D, no notice
14 was required, so there was an event of default, it makes
15 sense Libby filed, sought administration was an event of
16 default.

17 You go to the next section, Section 13, close-out
18 on the occurrence of an event of default the following shall
19 immediately occur, Part C provides that the non-defaulting
20 party, Maverick, had to calculate the amounts, and then
21 Section D on page 44 of 80 makes clear that there's
22 automatic net.

23 THE COURT: Okay.

24 MR. LEVINE: So that under the prime brokerage
25 agreement in effect, there was a provision which said prior

1 agreements they're better for Lehman control, this prior
2 agreement makes clear that there's automatic netting in the
3 event of an event of default.

4 So we think that makes clear that they're netting
5 that.

6 THE COURT: So just to encapsulate that, you're
7 saying that notwithstanding that they were right with
8 respect to, I'll call it the LBI PB agreement that under the
9 LBI PB agreement, you have to revert to this constellation
10 of provisions in the previous PB agreement, which was, in
11 fact, with LBIE, and that gave you the advantage of netting
12 notwithstanding the fact that your status as a non-
13 defaulting party.

14 MR. LEVINE: Right, correct. And, you know,
15 frankly I think that's kind of standard and it's kind of
16 surprising to me that the LBI prime brokerage agreement
17 didn't provide for automatic netting. I think this is kind
18 of typical, you know, if things end, you figure out who owes
19 what to what, whom to whom, and you net.

20 So that we think that that's very important. And
21 maybe it's time to look at the proofs of claim.

22 THE COURT: Okay. That's tab 5.

23 MR. LEVINE: That's tab 5. As far as I know,
24 they're all the same except for which Maverick fund it is,
25 the amount claimed, and which guarantee they rely on.

1 So the language we're going to look at as far as I
2 know, and I checked very carefully is the same -- each of
3 the six proofs of claim. The difference on the guarantees
4 are three of them rely on the corporate resolution, and
5 three of them rely on the 2002 direct guarantee by LBHI.

6 Now, in fact, that 2002 direct guarantee was
7 replaced by a later guarantee, there was a direct guarantee
8 and the one that we think governs here even though it's not
9 mentioned in the proofs of claim, is a direct guarantee,
10 we're not contesting the application of that direct
11 guarantee, we clearly don't accept the fact that the
12 corporation resolution is enforceable, we don't accept the
13 fact that the S&P letter is enforceable, but we think none
14 of that matters for today because there's a direct guarantee
15 which we acknowledge is enforceable.

16 So anyway, so I'm just looking at the very first
17 one behind tab 5 which is the one from Maverick Wong and
18 Hanst (ph) Fund Limited. And of course, on the first page,
19 on the form page, they check this box if all or part of your
20 claim is based on the guarantee. And then if we actually
21 look at the text paragraph 1 just recites the filing. The
22 second paragraph 1 provides "this proof of claim is filed in
23 debtor's bankruptcy case by Maverick, Wong and Hanst
24 Unlimited. Maverick has a claim, the claim against the
25 debtor on account of the debtor's full guarantee pursuant,"

1 and they refer to the corporate resolution, "of the payment
2 of all liabilities, obligations and commitments of Libby."

3 So clearly that paragraph is only talking about
4 the guarantee. If we go to paragraph 2, again recites the
5 three agreements, the prime brokerage agreement, the
6 marginal lending agreement, and the global mass of
7 securities lending agreement, and then at the very bottom,
8 the last three words on that page it continues, "The Lehman
9 entities agree to provide certain prime brokerage services
10 to Maverick," and then it defines the different agreements
11 as the prime brokerage documents, and that's important,
12 prime brokerage documents, "under the terms of the prime
13 brokerage documents, Libby has a lien and first priority
14 security interest in certain assets held or controlled by
15 Libby."

16 Okay. Well, that certainly sounds like a right to
17 net, if you have a lien and first priority security interest
18 on the assets. And it continues in that same vein, "Such
19 assets are held as collateral by Libby as Asian and Bayleaf
20 (ph) or itself and all other affiliates of Libby, in
21 connection with Maverick's obligations under the prime
22 brokerage documents."

23 Again it sounds like they're admitting that we get
24 to net. Then importantly, the last sentence of paragraph 2
25 reads, "As of the petition date, the Lehman entities have

1 custody of Maverick's assets pursuant to the prime brokerage
2 documents, in the amount of 1.286 million," that's
3 aggregates across the six claims of 187 million.

4 "This proof of claim constitutes a demand for
5 payment under the guarantee." Then when describing the
6 claim in paragraph 3, "Maverick hereby asserts the claim,
7 the initial amount of that 1.3 million less any amounts owed
8 by Maverick, in connection with the prime brokerage
9 documents."

10 Okay. Now, in their opposition, Maverick argues
11 well, that's not netting, well, you know, sounds to me like
12 netting. And they drop a footnote, which also sounds like
13 netting.

14 THE COURT: Footnote 3.

15 MR. LEVINE: Footnote 3. "For the avoidance of
16 doubt, the initial claim amount is a gross claim and does
17 not take into account any amounts or obligations that
18 Maverick may owe to the Lehman entities under the terms of
19 the prime brokerage documents."

20 THE COURT: Well, that is a -- that language is to
21 protect them from an accusation that they overstated the
22 claim.

23 MR. LEVINE: Right, right, but it's certainly
24 consistent --

25 THE COURT: No, I understand.

1 MR. LEVINE: -- to their understanding that they
2 only got a net claim.

3 THE COURT: Right.

4 MR. LEVINE: Then they say, "the initial claim
5 amount may change depending on the current value of the
6 assets in custody until such time as Maverick exercises any
7 remedies it may have to liquidate the claim." Well, it's
8 claim.

9 Now, we don't agree with that, we think that
10 either it's the petition date under 502 or the determination
11 or rejection date under 562, but that was their claim,
12 that's fine.

13 Then we go with the additional (indiscernible),
14 because now remember they're asserting they have direct
15 claims under the PB agreements, and --

16 THE COURT: But they're seeking to amend to assert
17 them, they don't have direct claims under the filed
18 documents, right?

19 MR. LEVINE: Well, as I understand it, they argue
20 that those direct claims are embedded in here.

21 THE COURT: In here?

22 MR. LEVINE: Yes. They have suggested that if
23 they're wrong about that, they'd like to amend, but they
24 don't admit that they need to amend, as I understand their
25 position.

1 THE COURT: Okay. Well, I can ask them about
2 that.

3 MR. LEVINE: The -- I'm reading just now from
4 paragraph -- from footnote 13 of their opposition, "As noted
5 in footnote 3 of the estimation objection, Maverick's claim
6 also asserted and reserve rights with respect to various
7 other entitlements, such as interest, legal fees and other
8 damages, including damages for loss investment opportunities
9 and other items."

10 Now, we agree that they (indiscernible) mention
11 interest and fees, but we think it's completely inaccurate
12 to say that the Maverick claims also asserted and reserved
13 rights with respect to other entitlements including damages,
14 including damages for investment opportunities and other
15 items. We just don't think they're here.

16 So we think that to the extent they think they've
17 already asserted them, that's just wrong, and to the extent
18 that they want to assert them, they have to move to amend
19 the proof of claim, and of course we would argue it's much,
20 much too late for that.

21 THE COURT: Could you address -- there seems to be
22 an argument that somehow this is not capable of being
23 resolved in a sufficiency hearing basis.

24 MR. LEVINE: Well, we think that's just wrong
25 because there are no disputes. If 562 applies, we think the

1 -- well, we think that the fact -- our 562 argument relies
2 entirely on legal disputes, that the facts underlying those
3 arguments are not in dispute, that the settlement agreement
4 with Libby and Maverick was where all the prime brokerage
5 documents were terminated, there was no prior termination.

6 They admit that they got the value of their
7 assets, their cash and securities as of around that date.
8 So those are the only factual issues, we're not disputing
9 the money and I don't think they're disputing the
10 termination.

11 All they're raising is legal arguments, 562
12 doesn't apply because the prime brokerage documents are not
13 securities contracts and are not master netting agreements.
14 And the guarantee is not a security to the contract or
15 master netting agreements, we think those are issues of law
16 which Your Honor can resolve.

17 They argue that the prime brokerage documents were
18 only terminated as to Libby, not as to LBHI. Again, we
19 think there's no dispute the language of the settlement
20 agreement, the question is what is the legal impact of the
21 termination. Was there anything against LBHI that could
22 have survived and if there was, wasn't -- didn't that mean
23 that it was an executory contract which was rejected on the
24 date of the effectiveness of the plan.

25 So we think that clearly under the 562 argument,

1 it clearly can be resolved because the facts aren't that we
2 rely on are not in dispute, or we're not disputing them at
3 least for purposes of this hearing, and they're just legal
4 issues.

5 There's also the question of netting. We think
6 that -- or their right to diminution damages, we think that
7 clearly is another legal issue. The language of the prime
8 brokerage documents and the exculpatory language, we think
9 as a matter of law, as Your Honor has held in three
10 different cases and consistent with MF Global precludes
11 diminution damages.

12 So that we think that Your Honor -- so even if
13 Your Honor rejects the 562(a) argument, you certainly can
14 rule as a matter of law that there are no diminution
15 damages, which would then just leave a question of whether
16 they're entitled to the 4.3 million net amount owed to them
17 as of the petition date or some greater or lesser amount I
18 guess.

19 But it seems to me, you know, let me -- because as
20 you know, I have never gotten over show and tell, I can't
21 leave without a handout, so I'd like to hand up one and
22 counsel and approach the bench.

23 THE COURT: And then I'll ask you to wrap up.

24 MR. LEVINE: Okay.

25 THE COURT: This is just a demonstrative, right?

1 MR. LEVINE: This is just a demonstrative. These
2 are numbers. So -- okay. So the top of this is supposed to
3 be our summary of the proofs of claim.

4 THE COURT: Uh-huh.

5 MR. LEVINE: And as we see it, it's purely a
6 guarantee claim in which they seek 187.3 million in the
7 aggregate, but expresses, when we look at the sample group
8 of claim, expressly minus any amounts owed by Maverick back
9 to Libby, and they think fees and expenses which are
10 unliquidated and interest which is unliquidated, and we
11 don't think they're entitled to those either for the normal
12 reasons, and then no other claims asserted.

13 Then in their current theory which comes from
14 their objection to the estimation motion, and their response
15 to our objection to their claim, there are guarantee claim
16 components, in which they assert that not 187.3 million, but
17 the value of their long positions, just their long positions
18 without netting was 118.1 at the petition date, that they
19 received 101.9 million in value as of the settlement date,
20 and therefore, that difference is the 16.2 they're asking
21 for we say that since you value it under 562 with the
22 settlement date, there's nothing that's owed to them.

23 Fees and expenses and interest are still
24 unliquidated. In terms of the second page, there are other
25 claims, they're not saying they have asserted, they want to

1 amend to assert direct claims under the prime brokerage
2 documents. Those do not seek any incremental damages, so we
3 understand it, it's still the 16.2 as opposed to the 187.3
4 on the proofs of claim.

5 Now, we obviously have various responses that are
6 not asserted in the proofs of claim, LBHI did not assume any
7 broker dealer obligations, and all the other defenses that
8 apply to the guarantee claims apply.

9 And then they have consequential damages. And all
10 we know about the consequential damages are what's in that
11 footnote I read to you before, which simply says that they
12 have consequential damages without offering any factual
13 support, any -- well, let me read it to you.

14 In addition -- this is from the estimation motion
15 objection footnote 3 --

16 THE COURT: Which is tab?

17 MR. LEVINE: Tab 4, I'm sorry. Tab 4, page 4.

18 THE COURT: Okay.

19 MR. LEVINE: Footnote 13, and they basically
20 repeat this in their response to the objection motion they
21 refer back to this paragraph. But this is basically all
22 they said about --

23 THE COURT: Other damages.

24 MR. LEVINE: -- other damages, or lost investment
25 opportunities is what they call it.

1 In addition to the 16.2 million recoverable by
2 Maverick, the Maverick entities proofs of claim also reserve
3 the right to seek interest and legal fees, and also
4 generally asserted and preserve the right to pursue all
5 amounts payable in connection with the prime brokerage
6 agreements.

7 And actually what it says the prime brokerage
8 documents, which is a full list of agreements, not just the
9 PB agreements and the guarantees. "Although Maverick
10 believes the \$16.2 still owed to it provides ample
11 justification to deny the estimation motion with respect to
12 the Maverick entities.

13 "Maverick expects that it may in the future
14 continue to pursue any rights it may have to collect
15 interest, legal fees, or other damages, including damages
16 for lost investment opportunities or other items."

17 And that footnote is basically repeated in their
18 most recent objection, but lost investment opportunities, I
19 mean, we know under New York law it's virtually --

20 THE COURT: You don't have to spend time on this.

21 MR. LEVINE: Okay. The final thing is I got
22 handed a note by Mr. Fail, let me just make a couple of
23 points that he asked me to make.

24 Another reason that Section 562 applies to the
25 guarantee claims is that 562 talks about damages, it's not -

1 - in their papers they kind of suggest 562 is a measure of a
2 claim, how much a claim should be, but that's not right.
3 562 talks about damages. And then they say, well, New York
4 law says you could calculate damages on the date of breach,
5 and I agree with that.

6 But here we have a Bankruptcy Code provision,
7 which under the supremacy clause controls, which says that
8 if under 562, if 562 applies, damages are measured as of the
9 termination date, rejection date, liquidation date.

10 And finally, we think that a fundamental problem
11 with Maverick's approach under 562 is that it would suggest
12 that where 562 applies to a primary obligor, it might not
13 apply to a guarantor --

14 THE COURT: You have a two tiered system with two
15 sets of books.

16 MR. LEVINE: -- two tier, you got it, Your Honor.

17 Then I'll sit down and let Your Honor -- thank you
18 very much for your patience.

19 THE COURT: Sure.

20 MR. FAIL: Can I just correct? Sorry. One more
21 thing and I won't correct Rick, Garrett Fail, Weil Gotshal
22 for the record. Your Honor asked the question before if we
23 were aware of any claims against LBHI that had a primary
24 obligor Libby that were allowed, I said I wasn't. I've
25 since had a chance to check with my client, there was one

1 claim that was allowed where the amount received by the
2 counterparty was less than the claim allowed by Libby or the
3 claim asserted against LBHI due to certain unique
4 circumstances of an agreement.

5 So we allowed one guarantee claim against LBHI,
6 where we appropriately think the guarantee should be paid.
7 In terms of the estimation motion, I said that there were
8 largely two parties that were still disputing that. There
9 are two additional claims, plus or minus a million dollars
10 each that are also outstanding --

11 THE COURT: Okay.

12 MR. FAIL: -- that are disputing it. Other
13 parties have claims outstanding with respect to estimation,
14 but they won't be litigated if there's an agreement that
15 those claims will be withdrawn on a date certain in the
16 future.

17 THE COURT: Okay.

18 MR. FAIL: And in terms of claims that are being
19 litigated, other Libby related, we spoke about SRM, Newport
20 and Providence you're aware of.

21 THE COURT: Yes.

22 MR. FAIL: And there's one additional claim that
23 I'm aware of, Highland, which is in mediation, a \$5 million
24 claim, so I just wanted to be complete for the record.

25 THE COURT: All right.

1 MR. FAIL: All the unique circumstances.

2 THE COURT: It was just by way of background for
3 me, it's neither here nor there in terms of legal arguments.

4 MR. FAIL: I agree, thank you.

5 MR. ROLL: Good morning, Your Honor.

6 THE COURT: How are you?

7 MR. ROLL: I'm fine, Your Honor, how are you?

8 THE COURT: Good.

9 MR. ROLL: William Roll of Sherman & Sterling
10 appearing on behalf of the Maverick entities. I'm here with
11 my colleague, Randall Martin.

12 Just a program though if I might, Your Honor --

13 THE COURT: Sure.

14 MR. ROLL: -- if it's all right with the Court, I
15 was hoping to afford Mr. Martin to argue at least some of
16 this because he's --

17 THE COURT: Of course.

18 MR. ROLL: -- done 99 percent of the work, so he
19 should have at least some of the fun.

20 THE COURT: Delighted.

21 MR. ROLL: My intention is if we get things like
22 the exculpatory provisions --

23 THE COURT: Sure.

24 MR. ROLL: -- and the proof of claims, I'm going
25 to turn that over to him.

1 THE COURT: Sure. I want to ask you a couple of
2 questions, though --

3 MR. ROLL: Of course.

4 THE COURT: -- right off the bat.

5 So suppose there was no Lehman filing broadly
6 speaking and life just went on.

7 MR. ROLL: Yes.

8 THE COURT: Right? And the Maverick entities
9 decide to part ways with Libby. And they terminated the
10 prime brokerage agreement.

11 MR. ROLL: Uh-huh.

12 THE COURT: Give me back my stuff, we're going to
13 go to another broker dealer.

14 MR. ROLL: Right.

15 THE COURT: Okay. And at that moment in time, the
16 custody and securities were worth less than what they were
17 when you gave them to Libby.

18 MR. ROLL: Uh-huh.

19 THE COURT: Would you have a right to call in the
20 guarantee for the diminution in value?

21 MR. ROLL: Well, there would be no diminution in
22 value, as Your Honor has articulated that hypothetical,
23 because we would be looking at just that one date.

24 THE COURT: I'm sorry, no, my hypothetical is that
25 on the -- at the commencement of the relationship with the

1 prime broker --

2 MR. ROLL: Right.

3 THE COURT: -- with LBHI as a guarantor --

4 MR. ROLL: Right.

5 THE COURT: -- you -- custodies, securities that
6 were say a billion dollars --

7 MR. ROLL: Correct.

8 THE COURT: -- okay. And then you decide you're
9 going to go with a different broker dealer, right, and you
10 terminate. And you say to Libby, give me back my stuff,
11 right. And Libby says, sure, here's your stuff. Okay. Or
12 Libby says, and you agree, well, we don't want back our
13 stuff, we just want the value of our stuff. And the value
14 of the stuff on that date is half a million dollars less,
15 right. You get to go ask for that half a million dollars
16 from your guarantor?

17 MR. ROLL: No.

18 THE COURT: Why not?

19 MR. ROLL: Because we would have -- well, Your
20 Honor started with a very big if. No bankruptcy filing, so
21 we're in a normal relationship, so we, Maverick, would be
22 taking a risk in that circumstance of asking for its
23 securities back --

24 THE COURT: Why is that --

25 MR. ROLL: -- at a time when the value would've

1 diminished.

2 THE COURT: Why does that not apply in this
3 situation?

4 MR. ROLL: Because of the application of 502 in
5 the Bankruptcy Code, because of the fact that --

6 THE COURT: So you get more in bankruptcy than you
7 would out of bankruptcy?

8 MR. ROLL: Because --

9 THE COURT: You get an enhanced claim against a
10 bankrupt guarantor.

11 MR. ROLL: In these -- in the circumstances
12 presented here --

13 THE COURT: That's pretty good stuff.

14 MR. ROLL: It's good stuff, but it's consistent
15 with the law. And I think it's important to note that Your
16 Honor's hypothetical, it's a fair question, but in that
17 circumstance, Maverick could have taken -- made the choice
18 at any point along the way to say, give me my stuff back.

19 THE COURT: Right.

20 MR. ROLL: With the bankruptcy having intervened,
21 we didn't have that choice. So in Your Honor's hypothetical
22 we could have said, well, you know --

23 THE COURT: You realize what you just said. When
24 the bankruptcy intervened, you didn't have that choice. So
25 that's consistent with the application of the exculpation.

1 It's the absence of choice that was --

2 MR. ROLL: In terms of the number, because --
3 that's all I was really getting at, Your Honor. Because
4 when the bankruptcy intervened, when -- and let's, you know
5 --

6 THE COURT: Go back to my hypothetical, you know,
7 because a guarantee is a guarantee is a guarantee --

8 MR. ROLL: Correct.

9 THE COURT: -- according to you.

10 MR. ROLL: Right.

11 THE COURT: So when you -- you get a guarantee
12 from LBHI parent --

13 MR. ROLL: Uh-huh.

14 THE COURT: -- and then you decide to terminate --

15 MR. ROLL: Right.

16 THE COURT: -- and your stuff is worth less, you
17 have a guarantee. Well, I don't understand why out of
18 bankruptcy you would not be able to then say, make good on
19 the guarantee.

20 MR. ROLL: We have a guarantee for whatever the
21 obligation is at that point.

22 THE COURT: At the point of the termination.

23 MR. ROLL: No, no. In this particular instance,
24 there was no termination. The value of the guarantee
25 derives from the claim we're able to assert under Section

1 502 of the Bankruptcy Code against LBIE on or LBHI and LBIE
2 on the petition date --

3 THE COURT: But the claim was unliquidated on the
4 petition date.

5 MR. ROLL: Understood. But New York law says,
6 it's a New York law governing contract, New York law says
7 the damages are measured from the date of the breach. The
8 breach occurred on the date they went into administration,
9 which is the same date that LBHI filed for Chapter 11.

10 So that's when things begin. And on that date, we
11 have a claim against LBIE under New York law for the amount
12 of the securities, i.e., you know, what they're holding
13 because they breached the obligations to return those.

14 We have a claim under the guarantor, as of that
15 same date for that same amount, but we can't exercise it, we
16 can't exercise the right under the guarantee because LBHI
17 has filed.

18 So at that point and from that point, we have a
19 claim for 108, at least 118 the value of the securities at
20 that point in cash, which they don't dispute. Every day
21 from that point, until we get to March of 2012, and under
22 the LBHI theory today, everything changes at that point.

23 They say, well, the settlement agreement is
24 entered into, it effectuates a payment in full to Maverick,
25 the liability under all the agreements, including guarantee

1 is extinguished and everybody goes home, but that's not
2 quite right.

3 That doesn't take into account the -- two things,
4 two sets of things. The first thing is the facts, what
5 actually happened at that point, which is there was a --
6 LBIE's liability and the damages was actually compromised at
7 that point, following a real live negotiation engaged in by
8 real live people coming up with a real live agreement, which
9 Mr. Levine quoted from, and I'm going to quote from too.

10 That said because of the positions taken in that
11 negotiation and because of the application of UK insolvency
12 law, all you're going to get, Maverick, at this point, is
13 the value that UK insolvency law would say you get, which is
14 the value of the cash and securities at that point, the
15 10149.

16 But it didn't change what was owed to us under the
17 guarantee, the amount of the claim for which was fixed as of
18 the petition date, unless there's some basis on which it can
19 be set that got terminated, and this was a question Your
20 Honor put to Mr. Levine at the very beginning of his
21 argument, you know, which is -- if it's not terminated --

22 THE COURT: But you're assuming your conclusion.
23 You're assuming that simply because there was an LBHI
24 petition date --

25 MR. ROLL: Uh-huh.

1 THE COURT: -- and you can come up with a number -
2 -

3 MR. ROLL: Right.

4 THE COURT: -- a value of the securities on that
5 petition date, that that's the amount you get to assert
6 against LBHI on the guarantee. But that's not an argument,
7 that's just ipso daisy, I mean --

8 MR. ROLL: Under 502, the amount of claimants
9 fixed as of petition.

10 THE COURT: But that assumes that 562(a) does not
11 apply.

12 MR. ROLL: Well, 562(a) does not apply, and I can
13 go right into that if Your Honor would like. This may be
14 the nub of it, you know, they say the agreement -- the
15 guarantee was terminated for two sets of reasons --

16 THE COURT: Forget about whether it's terminated
17 or not. Assume it's not terminated.

18 MR. ROLL: If the guarantee -- if it is not
19 terminated and if the guarantee was terminated and 562 does
20 not apply, there should be absolutely no dispute that we're
21 entitled to what Section 502 would say, we can assert
22 against the guarantor which is the value as of the petition
23 date. Their entire argument on sufficiency rests on the
24 notion that we were somehow paid in full, which relates to
25 the very fact set of issues surrounding the numbers, and I

1 was going to get to --

2 THE COURT: What do you mean factee issues
3 surrounding the numbers? There's no facts surrounding the
4 numbers. You say you should be able to assert a claim on
5 the guarantee for the 118 so essentially you can get
6 distributions from LBHI that would catch you up and give you
7 full recovery on the 118 as opposed to the 101, that you've
8 already gotten.

9 MR. ROLL: I was referring to the back and forth
10 between the parties in the negotiations, the evidence of
11 which is not at all before the Court at this stage, that
12 resulted in the number of 101.9 at the time we did the
13 settlement with LBIE, that's what I was referring to.

14 But the second part of their, you know, you were
15 paid in full argument is that the guarantee was terminated,
16 and therefore 562 kicks in and that's how you measure the
17 damages. But let's think about that. 562 requires at least
18 three things, a specific party, a specific kind of an
19 agreement, and a specific action being undertaken on behalf
20 -- by that party with respect to that agreement.

21 We're not going to fight about, you know, the
22 specific party here, you know, whether it's a securities
23 contract or whatever, but we do take issue with the notion
24 that the guarantee was actually terminated in connection
25 with the settlement, because it clearly was not.

1 The settlement agreement itself says, quite
2 clearly that it's terminating the relationship between LBIE
3 and Maverick and not anybody else, and it specifically
4 reserves to Maverick the right to pursue claims against any
5 other Lehman entity.

6 THE COURT: Sure, but you know, this is where you
7 go into your, you know, your Ivanho argument which you think
8 is a show stopper. But the fact of the matter is that all
9 of that only stands for the proposition that had claims
10 against LBIE, claims -- if LBIE had not been 100 percent
11 payor, you would unquestionably be able to assert the full
12 amount of that claim against LBHI so that you could become
13 paid in full, but you got paid in full by LBIE on the 101.

14 MR. ROLL: We got paid 101, but that was not --
15 that was clearly not payment in full in the eyes of the
16 Maverick people.

17 THE COURT: So let me ask you a different
18 question. Let's take a little walk around the Bankruptcy
19 Code.

20 MR. ROLL: Okay.

21 THE COURT: 502(b)(6).

22 MR. ROLL: 502(b)(6), okay.

23 THE COURT: All right. The cap on lease rejection
24 damages.

25 MR. ROLL: Okay.

1 THE COURT: See, he is smarter than you, he knows
2 exactly what it is.

3 MR. MARTIN: We were going to bring up this
4 example, Your Honor.

5 THE COURT: Okay. All right. So 502(b)(6) says
6 if, you know, if you reject a lease, your damages are capped
7 pursuant to 502(b)(6).

8 MR. ROLL: Right.

9 THE COURT: Right. And the landlord might say,
10 well, that's really nice, tenant debtor, but I've got this
11 nice guarantee. Okay. So I would think that you would tell
12 me, see, that's just like this, we've got this guarantee so
13 that the allowance of the lesser amount pursuant to the
14 Bankruptcy Code doesn't mean that I don't get to assert the
15 full amount of my damages against my guarantor, right.

16 MR. ROLL: Correct.

17 THE COURT: Okay. However, under the Bankruptcy
18 Code if your guarantor is a debtor it doesn't work that way,
19 the cap applies.

20 So this notion that there's some greater ability
21 to recover under applicable -- I put in air quotes, although
22 air quotes have been much maligned nowadays -- applicable
23 non-bankruptcy law, you know, doesn't necessarily fly. And
24 here I draw an analogy to the way 562(a) works both as a
25 matter of policy and actually by its terms --

1 MR. ROLL: Uh-huh.

2 THE COURT: -- to rebut the concept that, you
3 know, a guarantee, is a guarantee, is a guarantee, and you
4 get more than your -- the obligation owed to you by your
5 primary obligor, which is in fact what you're seeking.

6 MR. ROLL: Right.

7 THE COURT: You're seeking more than what your
8 primary obligor owed you.

9 MR. ROLL: Because of the operation of UK
10 insolvency rules so we get the value of the securities on
11 that date. And there is law from the southern district,
12 stated in our papers, which they don't deal with, unless I
13 missed it, and I don't think I did, the Instituto (ph) case
14 on page 14 of our --

15 THE COURT: Uh-huh.

16 MR. ROLL: -- objection, which basically says that
17 the discharge -- a guarantor's obligations on the guarantee
18 are not discharged by reason of discharge of the primary
19 obligor's obligations as a result of foreign bankruptcy law.
20 That's still good law from the district court here, and they
21 don't address it at.

22 So as a result of that that discharge at the level
23 of 101.9 as a result of the negotiations we had with them
24 over what counted and what didn't to get to the final
25 number, means that we still retain the full amount of the

1 claim against the guarantor, you know, irregardless of what
2 happens in connection with the foreign bankruptcy
3 proceeding.

4 So you still have that, and if you combine that
5 with Ivanho (ph) that means we can still recover -- we can
6 still assert the full amount of the claim against the co-
7 obligor/guarantor up to the point of payment in full,
8 payment in full being defined by New York law in this
9 circumstance, because damages are measured as of the date of
10 the breach, against the guarantor.

11 So -- and I sense that Your Honor apprehends that
12 this is the argument, because this is where the Court
13 started with Mr. Levine, so I know that I'm not saying
14 anything that Your Honor doesn't already know that we're
15 going to say, but that really is the nub of the argument.

16 What I would say with respect to the hypothetical
17 scenarios and the 506(b), you know, I'm not smart enough to
18 parse 506(b) on the fly, maybe Mr. Martin can do it, he
19 can --

20 THE COURT: 502(b)(6).

21 MR. ROLL: 502(b)(6), I'm sorry -- you know, maybe
22 he can do it and fix whatever I've left unfixed at that
23 point, but respectfully we're not dealing with a
24 hypothetical circumstance.

25 THE COURT: But we're not -- but we're also not

1 dealing with New York law, we're dealing with the Bankruptcy
2 Code and we're dealing with the operation of 562(a) --

3 MR. ROLL: Right.

4 THE COURT: -- under the Bankruptcy Code two
5 securities contracts.

6 MR. ROLL: But -- right.

7 THE COURT: Which is -- the prime brokerage
8 agreement certainly is, and which the guarantee certainly
9 is.

10 MR. ROLL: Well we'll assume that for the purposes
11 of this argument, but that's only two -- that's two-thirds
12 -- or that's one-third, and I'll concede the other third --

13 THE COURT: Why isn't --

14 MR. ROLL: Because it was not terminated. It was
15 not terminated in connection with the settlement, period,
16 full stop, because of what the parties did and because of
17 what the documents provide.

18 THE COURT: Well but there's terminate and there's
19 terminated, right? To the extent that the underlying
20 relationship terminates, right, let's go back to my
21 502(b)(5) example --

22 MR. ROLL: Uh-huh.

23 THE COURT: -- to the extent that the underlying
24 relationship terminates I'm not exactly sure what the
25 termination of a guarantee means. There are no ongoing --

1 there's no ongoing relationship between the primary obligor
2 and the primary obligee, but the obligation of the guarantor
3 to pay it is what it is as of that moment in time.

4 MR. ROLL: But the guarantee itself tells us what
5 it means for the guarantee to not exist -- for the
6 obligations under the guarantee to not exist. And we should
7 look at that. There's only one instance in which the
8 guarantee itself -- and this is the one that's toward the
9 back of the book, I forget which tab it is -- but it's the
10 one that the parties have referred to as the LBHI guarantee.

11 THE COURT: Uh-huh.

12 MR. ROLL: 4(c).

13 THE COURT: Uh-huh.

14 MR. ROLL: If Your Honor would look at the --

15 THE COURT: But you have to deal with the language
16 that says that -- the termination language that says that
17 all obligations --

18 MR. ROLL: Uh-huh.

19 THE COURT: -- are terminated.

20 MR. ROLL: You're talking about the language in
21 the settlement agreement.

22 THE COURT: Yeah.

23 MR. ROLL: All obligations of LBIE.

24 THE COURT: No, but that's not exactly right.

25 Let me -- you show me what you wanted to show me.

1 MR. ROLL: I'll show -- well let's go to the --
2 let's talk about the settlement agreement first --

3 THE COURT: Sure.

4 MR. ROLL: -- because we're on it, and then we'll
5 go back to the guarantee.

6 THE COURT: What's -- give me the tab, please.

7 MR. MARTIN: 4(e).

8 MR. ROLL: 4(e) for the settlement agreement.

9 THE COURT: 4(e). Okay.

10 MR. ROLL: If Your Honor would look at paragraph
11 2.1(a), I think this is one of those that Mr. Levine may
12 have actually pointed Your Honor to.

13 THE COURT: Yep.

14 MR. ROLL: But it says the relevant agreements and
15 all transactions thereunder --

16 THE COURT: Uh-huh.

17 MR. ROLL: -- are terminated as between LBIE and
18 each Maverick entity. It doesn't say anything about LBHI,
19 it doesn't say anything about the --

20 THE COURT: No, I'm thinking of --

21 MR. ROLL: -- guarantee.

22 THE COURT: -- a different provision. I'll have
23 to find it.

24 MR. ROLL: Okay. But this one doesn't go away, I
25 mean this one is here.

1 The second part of that, subsection (b) says that
2 this deed shall be a full and final settlement of all
3 rights, obligations, liabilities, and claims, et cetera, et
4 cetera, which LBIE and each Maverick entity may have against
5 one another, including, but not limited to, and it goes on
6 from there. And it doesn't say anything about LBHI.

7 THE COURT: Well --

8 MR. ROLL: And they knew about LBHI at the time
9 and they knew about the guarantee.

10 You can then look at paragraph 2.3, which is the
11 release language, the releases, which are actually once
12 litigated you can say that's the most operative part of any
13 settlement agreement most important, and the one where it's
14 most important to be clear provides that it's only the
15 Maverick entities and LBIE that are releasing each other
16 with respect to all claims.

17 Again, the parties knew about LBHI and the
18 guarantee.

19 THE COURT: But the guarantee says that the
20 guarantee will remain in full force and effect until the
21 first two occur of --

22 MR. ROLL: Right.

23 THE COURT: -- the obligations defined term, no
24 longer in existence, and the prime brokerage guarantee
25 defines obligations as all obligations under the agreements,

1 a defined term, and the defined term agreements includes the
2 prime brokerage agreements, the GMSLAs, and the letter
3 agreement, and the MLAs. So --

4 MR. ROLL: But the obligations no longer being in
5 existence is not a termination under this language.
6 Termination is -- this is the point I was trying to get to
7 before. Termination is effectuated by notice. Obligations
8 no longer being in existence means, has to be based on the
9 other language in this document, paid in full, and that has
10 to mean --

11 THE COURT: You're ignoring the language --

12 MR. ROLL: -- under New York law.

13 THE COURT: -- that says the guarantee will remain
14 in full force and effect.

15 MR. ROLL: Right. Until the first --

16 THE COURT: Until the obligations are no longer in
17 existence.

18 MR. ROLL: But the obligations are in fact in
19 existence. The obligations are still in existence because
20 we have not been paid in full --

21 THE COURT: Can you hold on one second?

22 MR. ROLL: Certainly.

23 THE COURT: Hold on one second.

24 (Pause)

25 THE COURT: Okay. Go ahead, Mr. Roll, sorry.

1 MR. ROLL: I would just contend, Your Honor, that
2 that -- you know, termination is the trigger for 562. My
3 point is that the obligations no longer being in existence
4 is not a termination point, it has to do with actual payment
5 in full.

6 And the reason I say that is, that position is
7 consistent with the rest of the language in the agreement,
8 which actually indicates that there are certain
9 circumstances in which the obligations still remain. In
10 fact the very next sentence. Termination of this guarantee
11 shall not affect the guarantor's liability hereunder as to
12 the obligations incurred or arising out of transactions
13 entered into it prior to the termination thereof.

14 So obligations still being in existence is
15 separate and apart from termination. It's a separate
16 concept.

17 THE COURT: Okay.

18 MR. ROLL: And there's actually another provision
19 in here that says the obligations can spring back to life if
20 they -- even if they've been paid in full and a bankruptcy
21 proceeding allows them to be avoided -- payments to Maverick
22 to be avoided.

23 So termination and obligations being paid in full
24 are two different concepts in this guarantee, and I think it
25 was carefully drafted for that reason, and -- or to

1 establish that or to leave to be a readily ascertainable
2 inference to draw from the document.

3 And it must mean, I think any way, and we've made
4 this point in the papers, that paid in full doesn't relate
5 to terminating the obligations of LBIE as a result of the
6 operation of UK (indiscernible) and the settlement and
7 whatever was done there and whatever was left open or not,
8 but rather New York law, which says the damages are measured
9 as of the petition date, which is the date of the breach.

10 THE COURT: Okay. Do you want to -- we should
11 turn to anything you want to say about exculpation and we
12 should turn to anything you want to say about direct claims
13 and/or amendments.

14 MR. ROLL: Yeah, on that, Your Honor, I'll turn it
15 over to Mr. Martin who will cover exculpation.

16 THE COURT: Okay.

17 MR. ROLL: Probably the other items as well, but
18 if not I can come back on this.

19 THE COURT: Okay.

20 MR. ROLL: Thank you, Your Honor.

21 MR. MARTIN: Good morning, Your Honor.

22 THE COURT: Good morning.

23 MR. MARTIN: Thank you for indulging out --

24 THE COURT: No problem.

25 MR. MARTIN: -- tag team presentation.

1 THE COURT: Always like it when the younger person
2 teaches the older person a thing or two.

3 MR. MARTIN: I don't think that's going to happen
4 today, but --

5 MR. ROLL: I actually appreciate it too, Your
6 Honor.

7 MR. MARTIN: Could I touch on briefly the example
8 in the question that you opened with to Mr. Roll?

9 THE COURT: Sure.

10 MR. MARTIN: Because I think that you're creating
11 a hypothetical that can't and won't happen in the real
12 world. And it is the case that we are not asserting a claim
13 for one penny more than we are entitled to outside of
14 bankruptcy.

15 You raised the hypothetical in which we went --

16 THE COURT: Hold on one second.

17 (Pause)

18 THE COURT: Go ahead.

19 MR. MARTIN: You proposed a hypothetical in which
20 we wanted to terminate our relationship with the Lehman
21 entities outside of bankruptcy.

22 THE COURT: Uh-huh

23 MR. MARTIN: Every day outside of bankruptcy that
24 we have a long position open, we're betting on Apple stock,
25 for instance, we are assuming the risk that Apple stock goes

1 up or down.

2 THE COURT: Yes.

3 MR. MARTIN: So it's custody with them, but every
4 day we have it with them.

5 THE COURT: You do have that risk, right.

6 MR. MARTIN: And so if we tell them we want to
7 terminate the relationship, please give us our securities
8 back or the monetary (indiscernible) --

9 THE COURT: Uh-huh.

10 MR. MARTIN: -- they have to give it back to us.

11 THE COURT: Uh-huh.

12 MR. MARTIN: If they take two years to execute
13 that instruction and during that two years after which we've
14 told them we don't want to be invested in Apple stock --

15 THE COURT: Uh-huh.

16 MR. MARTIN: -- we get the Apple stock back and
17 its declined in value --

18 THE COURT: Right. That's --

19 MR. MARTIN: -- in that case, yes, the guarantee
20 kicks in.

21 THE COURT: That's a fair clarification.

22 But here this goes right -- this takes us right to
23 exculpation. Here LBIE filed.

24 MR. MARTIN: It filed, that's right.

25 THE COURT: And that's what caused the delay.

1 MR. MARTIN: I don't think that our claim was
2 caused by a bankruptcy. Our claim is based on the fact --

3 THE COURT: Why didn't you get your securities
4 back sooner? You didn't get your securities back sooner
5 because there was a bankruptcy.

6 MR. MARTIN: But surely that's not what the force
7 majeure clause was intended to capture and pick up.

8 THE COURT: You don't think?

9 MR. MARTIN: It talks about tornados, it talks
10 about insurrections, it does not reference --

11 THE COURT: It does not reference --

12 MR. MARTIN: -- bankruptcy.

13 THE COURT: -- specifically -- well Judge Glenn in
14 MF Global certainly thought that suspension of trading by
15 SIPA with respect to LBI was pretty much of a financial
16 tornado.

17 MR. MARTIN: Respectfully we think he's wrong.
18 It's a term of art in the financial world. On suspension of
19 trading I think we have a half page footnote --

20 THE COURT: Okay.

21 MR. MARTIN: -- citing what a suspension of
22 trading means.

23 Critically I also think that the MF Global
24 language and exculpation clause also included a reference to
25 all laws. This one does not. So there is an important

1 distinction between the language that was at issue in that
2 case and our language.

3 And the other thing, Your Honor, that makes it I
4 think crystal clear to me, that the guarantee could not have
5 been eviscerated by a force majeure clause, is that the
6 guarantee itself says as much.

7 I'm at the third paragraph of paragraph -- of tab
8 C --

9 THE COURT: Okay.

10 MR. MARTIN: -- behind tab 4 --

11 THE COURT: Okay.

12 MR. MARTIN: -- and there's a provision in the
13 guarantee that expressly notes that the obligations under
14 the guarantee kick in if we are the subject of a claw-back
15 resulting from a preference.

16 THE COURT: Where are you?

17 MR. MARTIN: It's the third full paragraph down,
18 Your Honor. It's about two-thirds of the way down.

19 THE COURT: This guarantee is?

20 MR. MARTIN: Correct. And if you read that whole
21 paragraph what you'll see is that it expressly and
22 unambiguously contemplates that they will have to pay us
23 under the guarantee if we are the subject of a claw-back
24 with respect to a preference or a fraudulent conveyance.

25 THE COURT: Okay.

1 MR. MARTIN: That can mean one thing only.

2 Now, I know we're not making a claim based on a
3 preference and I know we're not making a claim based on a
4 fraudulent conveyance, but what this unambiguously means is
5 that if as a consequence of a bankruptcy we don't get paid
6 in full this guarantee is triggered. The parties said as
7 much.

8 And what else is a guarantee for?

9 THE COURT: It doesn't say that, let alone
10 unambiguously say that, but it's interesting.

11 MR. MARTIN: A preference would be consequence of
12 a bankruptcy.

13 THE COURT: I'm going to decline your invitation
14 to go down that path, because that's not what this says.
15 It's --

16 MR. MARTIN: Your Honor, we had some points to
17 make on netting as well if you'd like to hear those. I
18 don't know if those are the --

19 THE COURT: I actually would not. I think I'm
20 okay on netting.

21 The only other thing that I'm interested in
22 hearing is about this concept that there's either an
23 embedded direct claim in the claims that were filed or that
24 the Maverick entities ought to be allowed to amend to assert
25 a direct claim, which seems to include some notion of lost

1 investment opportunities. Is that on you or Mr. Roll?

2 MR. MARTIN: I can handle it, Your Honor.

3 MR. ROLL: That's perfectly fine. Counsel is
4 being generous to us and preserving our right.

5 We're not taking the position that there is a
6 direct claim embedded in the proof of claim.

7 THE COURT: Okay. Because I didn't see.

8 MR. MARTIN: And it's not there.

9 THE COURT: Okay.

10 MR. MARTIN: However, and this is critical, and
11 this speaks importantly to a point that you were discussing
12 with Mr. Roll. An absolute and unconditional guarantee of
13 payment is a standalone document under New York law and a
14 standalone series of obligations.

15 So our point on the direct claim is that it is so
16 similar to the claim asserted with respect to the guarantee
17 claim that we should be permitted opportunity to amend, if
18 necessary, although that only comes into play if you
19 disagree with Mr. Roll that 562 doesn't apply because the
20 guarantee wasn't terminated. We don't need the direct claim
21 otherwise so there's no need for you to resolve that unless
22 you go against us on 562.

23 THE COURT: But here's the part I don't
24 understand. If you think you have a claim for the delta
25 between 101- and 118- --

1 MR. MARTIN: Uh-huh.

2 THE COURT: -- which you do.

3 MR. MARTIN: Correct.

4 THE COURT: Okay? Then you think you have a claim
5 for lost investment opportunities, because I assume that the
6 theory of the claim is that if we had had that \$5 million
7 for that period of time we would have invested in all this
8 great stuff and we would have made all this money.

9 So the notion that you have that claim but you
10 didn't assert that, it just doesn't make any sense.

11 MR. MARTIN: You're switching I think from the
12 direct claim to the consequential damages claim, and those
13 are two different things in my mind. And I do think, Your
14 Honor, the proof of claim did adequately address our theory
15 of consequential damages.

16 THE COURT: You think a guarantee claim includes a
17 claim for loss investment opportunities?

18 MR. MARTIN: I think our proof of claim --

19 THE COURT: Really?

20 MR. MARTIN: -- adequately stated -- yes, Your
21 Honor.

22 THE COURT: Where does it say that?

23 MR. MARTIN: Under tab 5, page 2, the first --
24 sorry -- the last sentence, it's about halfway down on page
25 2 in Roman I.

1 THE COURT: Uh-huh.

2 MR. MARTIN: This is a very broad and very general
3 statement, Your Honor. We said, this proof of claim
4 constitutes a demand for payment under the guarantee. This
5 is a payment of any amount owed as a result of the breach of
6 the guarantee which occurred under New York State law as of
7 the petition date.

8 THE COURT: So you can say to me today that
9 statement means that we have a claim for lost investment
10 opportunities for \$50 million? Surprise LBHI, how's your
11 reserve looking? I mean that's --

12 MR. MARTIN: There should be --

13 THE COURT: -- it doesn't work that way. Okay?
14 It doesn't work that way.

15 MR. MARTIN: Are there any other points that Your
16 Honor would like to be addressed?

17 THE COURT: All right.

18 MR. MARTIN: Thank you, Your Honor.

19 THE COURT: Thank you. Clean up, anyone?

20 MR. LEVINE: Yeah, Your Honor, I'd appreciate -- I
21 can be very quick.

22 THE COURT: I'm going to hold you to that.

23 MR. LEVINE: Fair enough. You've been very
24 generous with your time.

25 Okay. So the first thing, I just wanted to

1 enforce a few things that Your Honor questioned counsel
2 about. In terms of the exculpation provision and what
3 happened after Libby filed for administration, on page 8 of
4 their response --

5 THE COURT: And counsel cited a district court
6 case that says it's dispositive in their favor of that
7 argument that --

8 MR. LEVINE: Well what I was going to point you
9 to, Your Honor --

10 THE COURT: Yeah.

11 MR. LEVINE: -- was their own statement. I'm
12 reading from their brief, and you know, that in opposition
13 to the current objection, the one they filed.

14 Libby -- under the -- this is tab 2, page 8, if
15 you want to read along, paragraph 22. The Maverick claims
16 are straightforward. Under the prime brokerage agreements
17 and the New York Uniform Commercial Code, Libby was
18 obligated to return all custody, cash, and securities to the
19 Maverick entities upon request. Libby however was not in
20 the position to do so after having commenced its
21 administration proceedings.

22 To me that consistently would require rulings.
23 That is under clause 28 of the PB agreement. You'll agree
24 that Lehman Brothers will be liable for any loss caused
25 directly or indirectly by government restrictions, exchange

1 or market rulings -- that doesn't really apply -- suspension
2 of trading. They couldn't perform. They admit the reason
3 they have a new offer is because once Libby filed for an
4 administration it wasn't able to trade, it wasn't able to
5 perform. To me that's clearly covered.

6 In terms of the lost opportunities, the last
7 sentence of paragraph 29 of the PB agreement says, in no
8 event with Lehman Brothers be liable for any special,
9 indirect, incidental, or consequential damages. Lost
10 investment opportunities or quintessential for consequential
11 damages. Consequential damages you almost never get unless
12 you have a specific instrument you can point to.

13 In terms of the guarantee. Your Honor I think was
14 completely on point when you were directly counsel to the
15 last paragraph on the first page of the guarantee. This
16 guarantee will remain in full force and effect until --
17 until means something -- the first two occur of the
18 obligations are no longer in existence.

19 As you pointed out the obligations refer back to
20 Libby's obligations as a guarantee. It's not direct
21 obligations, it's guaranteed obligations. Libby's
22 obligations were completely released and extinguished by the
23 settlement.

24 And in terms of the distinction which I don't
25 really understand between termination and ending of the

1 guarantee, the next sentence says, termination of this
2 guarantee shall not effect. Clearly it understood the prior
3 sentence to relate to a termination of the guarantee.

4 As you know that, you know, we don't think it
5 matters for 562 whether the guarantee was terminated, even
6 though we think it was, because it governs damages in
7 relation to securities contracts, master nettings
8 agreements, the damages at issue are those that are running
9 under the prime brokerage documents which I think is clearly
10 under the very, very broad language of the second circuit
11 in --

12 THE COURT: Madoff.

13 MR. LEVINE: -- Card versus Ira Fishman (ph),
14 including they specifically call out were it not for the
15 account documents -- I'm reading from the second circuit
16 decision -- were it not for the account documents there
17 would be no basis for a customer to make deposits or request
18 withdrawals.

19 Their attempt to distinguish the PB agreement from
20 the definition of a securities contract, because what they
21 want was to get their securities back and not buy or sell
22 trades, is specifically described by the second circuit as
23 something that made the account agreements there a
24 securities contract.

25 And finally, Your Honor, I mean just to be kind of

1 crude, they paid \$30 million. They paid \$30 million to
2 Libby.

3 You know, you can't have an obligation to the
4 priming obligor and think you have a guarantee claim, it
5 just doesn't make sense.

6 THE COURT: Okay.

7 MR. LEVINE: Thank you.

8 THE COURT: All right. So, last licks, Mr. Roll?

9 MR. ROLL: Please, Your Honor.

10 THE COURT: Sure.

11 MR. ROLL: And I promise, I will be quicker than
12 Mr. Levine. And I appreciate the time --

13 THE COURT: Sure.

14 MR. ROLL: -- I appreciate everyone's patience.

15 The last point we paid \$30 million, we would have
16 paid a lot less if we had gotten full credit for the
17 securities cash that they had that they owed us, so that's a
18 red herring.

19 THE COURT: What do you mean if you had gotten
20 full credit --

21 MR. ROLL: If we had gotten everything that we
22 thought we were entitled to under -- from LBIE, if all the
23 positions had been closed out as we requested and the
24 resisted in the course of the negotiations we would have
25 ended up paying less.

1 So it's -- it doesn't mean that we weren't
2 entitled to --

3 THE COURT: Okay. Well I don't want -- I'm not --

4 MR. ROLL: But --

5 THE COURT: I really am trying to resist anyone
6 luring me away -- into contested facts, so.

7 MR. ROLL: Well I was going to stop at that point.
8 The bottom line on that is, it is part of a set of contested
9 facts which is inappropriate at a sufficiency hearing, and
10 they know full well that there was a lot more to the story
11 of what went on in those negotiations and what's in the
12 papers, because --

13 THE COURT: Okay. But you're doing precisely what
14 I said I'm not -- I don't believe that there's a need to go
15 beyond the undisputed facts --

16 MR. ROLL: Okay.

17 THE COURT: -- of using the 101- and comparing it
18 to the 118- that is now being sought.

19 MR. ROLL: Then I'll close on this point, Your
20 Honor.

21 With respect to the termination of the guarantee
22 as a matter of fact it was not terminated, absolutely --

23 THE COURT: What about the plan provision? What
24 about the argument that once you get to the plan it's over,
25 it's rejected?

1 MR. ROLL: As an executory contract?

2 THE COURT: Yeah.

3 MR. ROLL: I think it fails the countrymen test,
4 there were no remaining obligations on the part of Maverick,
5 so I don't think it actually qualifies as an executory
6 contract. And we saw that for the first time in their reply
7 brief, you know, that's my knee reaction to that. It's the
8 first we had heard of that. But again, I don't think it
9 meets the test for an executory contract.

10 This is the point I wanted to close on. The
11 guarantee was not terminated as a matter of fact or law or
12 else there would have been no reason for the existence in
13 the settlement agreement of the provision that preserved for
14 us the right to proceed against other Lehman entities. That
15 can only mean that we had the right to proceed on other
16 obligations held by other Lehman entities, including LBHI,
17 including the guarantee.

18 And on the proof of claim issue, you know, LBHI is
19 really claiming they're surprised by the consequential
20 damages point which we have been discussing with them for
21 quite some time and they know it --

22 THE COURT: It's not a question of what you've
23 been discussing with them, it's a question of what the proof
24 of claim says, so.

25 MR. ROLL: And if they believe it's not fairly set

1 forth, if the Court believes it's not fairly set forth we
2 would respectfully ask for the opportunity to move to amend
3 to make that claim, because we believe sincerely it's been
4 clear to them all along, and if need be to make it clearer
5 we'll do it in writing.

6 THE COURT: Okay.

7 MR. ROLL: Thank you, Your Honor.

8 THE COURT: Thank you.

9 So you can probably tell that I spent a lot of
10 time on this before today, but I very much wanted to hear
11 from you, because the issues are many, and here's the thing,
12 you're entitled to, and I think this probably merits a full-
13 blown written opinion. When that would occur just look
14 around. Starting trial in another Lehman matter on
15 April 3rd, 150 million at issue. As soon as that's over
16 starting trial on another Lehman matter in which the amount
17 at issue is \$2 billion. That promises to take me into 2018,
18 and that's just Lehman. I have a full docket otherwise. So
19 I don't want to deprive you of what's you're entitled to,
20 but I'd also like to help you progress beyond today.

21 So I'm going to give you my bullet points, what my
22 ruling -- what the decision will look like. Beyond that I
23 can't give you a date when I would issue a formal memorandum
24 opinion, but perhaps this could provide the bases for you to
25 have further discussions and figure out whether you want to

1 wait, you know, exercise appeal rights, et cetera, et
2 cetera.

3 If there were 48 hours in the day or if there were
4 two of me I could move more quickly, but it just -- it is
5 what it is. So it was a good happenstance that I was able
6 to even fit you in today for this hearing.

7 So the bottom line is that the Maverick claims
8 should be disallowed and expunged. The claims have been
9 satisfied in full by LBIE. Although claims are typically
10 valued under the Code as of the petition date, here Section
11 562(a) is applicable and provides an alternative date for
12 valuing claims that arise from the rejection, liquidation,
13 termination, or acceleration of certain specified contracts,
14 including master netting agreements, in quotes, and
15 securities contracts, in quotes.

16 So the prime brokerage agreements are securities
17 contracts and master netting agreements with the meaning of
18 Section 562(a).

19 Maverick's arguments that its claims are not based
20 on the securities contract aspects of the prime brokerage
21 documents and thus are not subject to 562 fails because the
22 argument is contrary not only to courts expansive reading of
23 the term securities contracts, and more specifically the
24 second circuits holding in the Madoff case find that
25 brokerage account agreement similar to those here are in

1 fact securities contracts, and that's explored in some
2 detail at pages 5 to 7 of Lehman's reply.

3 Mavericks' severability agreement, as I'll call
4 it, ignores the fact that the prime brokerage guarantee is a
5 separate securities agreement under the Code, and regardless
6 whether certain obligations arising under the prime
7 brokerage agreements are severable, which I don't believe
8 that they are, Section 562(a) applies here because the
9 claims are based upon a guarantee which qualifies as "a
10 security agreement or other arrangement or other credit
11 enhancement related to a securities contract or a master
12 netting agreement." And once again, these definitions of
13 these important terms are spelled out on Lehman's reply on
14 page 7.

15 So the operative date for valuing the claims un
16 562(a) is the settlement date, which is March 30, 2012, the
17 date of the Maverick LBIE settlement.

18 Each of the prime brokerage agreements, including
19 the guarantee, terminated on the settlement date. Pursuant
20 to the terms of the settlement agreement all quote/unquote
21 obligations under the prime brokerage documents were -- to
22 use the words of that agreement -- no longer in existence
23 from and after the settlement date. Therefore, Maverick's
24 reliance on the petition date for the valuation of its
25 claims is simply not correct. The prime brokerage

1 agreements were terminated in all respects functionally not
2 only as to LBIE.

3 Moreover, 562(a) would apply even if the guarantee
4 had not been terminated, because nothing in 562(a) requires
5 a guarantee be terminated for such section to apply. 562
6 governs the measurement of damages, quote/unquote, in
7 connection with, among other things, the termination of
8 securities contracts and master netting agreements.

9 As Lehman correctly points out, Maverick's reading
10 of Section 562(a) would limit its applicability and in
11 effect create a two-tier system of measuring damages.

12 First, primary claims in accordance with Section
13 562(a) as of the date of contract rejection, termination,
14 acceleration, or liquidation; and two, related guarantee
15 claims measured as of a different date.

16 I believe that this is incompatible with the
17 policy behind such guarantees, which are given in essence to
18 assure that the liability of the prime principal obligator,
19 the primary obligor is satisfied, which is what occurred
20 here.

21 Value of the Maverick guarantee claims are covered
22 by Section 562(a), they were valued at one hundred and one
23 point nine million dollars as of the settlement date, which
24 was the date that Maverick was made whole by LBIE.

25 Maverick cited Ivanho, but Ivanho and its progeny

1 merely stand for the proposition that a creditor cannot
2 recover more than the value of its claims or damages, and
3 Ivanho does not enable Maverick to assert additional
4 guarantee claim rights against LBHI.

5 Accordingly, I believe that Maverick cannot
6 establish a guarantee claim against LBHI because it cannot
7 establish any unsatisfied obligations of its primary
8 obligor, LBIE.

9 Maverick recovered the full value of its long
10 positions as of the settlement date. It would be contrary
11 to commercial practice and commercial reality for a
12 brokerage customer to be able to recover more from its
13 primary obligor and guarantor in bankruptcy than it would
14 outside of bankruptcy where a customer's economic exposure
15 is measured on a net basis with the value of its long
16 positions offset against its short positions.

17 In addition for reasons that I will elaborate
18 further in a more complete written opinion, I do believe
19 that Judge Glenn was correct in MF Global, I do believe that
20 under the principles that he articulated and the terms of
21 the documents here that the exculpation provisions would
22 themselves preclude the allowance of in essence what is the
23 diminution claim being asserted by the Maverick entities.

24 Finally, I do not believe that Maverick should be
25 allowed to amend its claims in any respects. Failed

1 guarantee claims they are clear on its face and I don't
2 believe that they have -- that it would be appropriate to
3 allow them the opportunity to expand upon the theories of
4 liability or the amount or nature of damages which had been
5 asserted in the guarantee claims.

6 So that's kind of the short form of what I would
7 write. I suppose I could give you the option of entering an
8 order and attaching the transcript, or just ask you to wait,
9 or a third option behind door number 3 would be to continue
10 to talk to one another and see if you can come to a
11 consensual resolution.

12 So it's not that I don't believe that this --
13 every claimant's claim is very important, but I just have a
14 reality of what I'm dealing with in terms of when I'd be
15 able to turn something out that I would be willing to sign
16 as a memorandum opinion.

17 MR. ROLL: We understand that, Your Honor. I --
18 respectfully I think we would choose a combination of one
19 and three, three being we'll continue to talk, and one being
20 not waiting. I mean we understand Your Honor is busy. If
21 Your Honor is inclined or is willing to enter an order with
22 the transcript attached that allows the right to -- affords
23 us the right and the opportunity to take to the next level
24 we would appreciate that.

25 THE COURT: Well I think fairness you'd have -- I'd

1 want you to discuss that.

2 MR. ROLL: Okay.

3 THE COURT: Because I really don't want to be in
4 the position of depriving anyone of due process in any
5 respect and what they're entitled to, and I don't like -- I
6 don't want anyone to feel that I'm giving them short shrift.

7 MR. ROLL: I understand that, Your Honor. We're
8 sort of -- I'm trying to balance --

9 THE COURT: Yeah, me too.

10 MR. ROLL: -- the need to get moving on it --

11 THE COURT: Me too.

12 MR. ROLL: -- and again, I don't want to burden
13 the Court. So we will continue to talk and if we may would
14 the Court permit us to get back to Your Honor --

15 THE COURT: Sure.

16 MR. ROLL: -- with how to proceed?

17 THE COURT: Absolutely.

18 MR. ROLL: I will say this though, I've seen in
19 other instances how capable the Court is in terms of turning
20 things out quickly and fully under tough circumstances, so.

21 THE COURT: Well but just to be clear, because you
22 know, among us who, you know, practice in this building a
23 lot people who know what 502(b)(6) is --

24 MR. ROLL: You will never let me forget that.

25 THE COURT: -- do not -- you're not -- no, you're

1 not allowed to give him a hard time when you go back to the
2 office.

3 MR. ROLL: I'll give him a very good time, because
4 he did well.

5 THE COURT: Good. I do turn out things very
6 quickly, very voluminous things, but often those are
7 instances in which I have a real live living, breathing,
8 struggling to breath debtor --

9 MR. ROLL: Understood.

10 THE COURT: -- and that makes for greater urgency.
11 So I'm trying to not dig myself deeper here, but --

12 MR. ROLL: That's fine, Your Honor. We're happy
13 to accommodate that, we'll talk to our friends on the other
14 side and we'll see what we can do.

15 THE COURT: Okay.

16 MR. ROLL: Thank you, Your Honor.

17 THE COURT: All right. Thank you very much.

18 (A chorus of thank you)

19 THE COURT: Just together just email chambers and
20 just let us know which path you have elected to take, and
21 you need not call out the party who's accenting.

22 (Laughter)

23 THE COURT: Okay? If there's a descent. If
24 there's agreement, great. If there's a descent just say,
25 you know, we're going to wait or whatever it is we're going

1 to do.

2 MR. ROLL: Very well, Your Honor.

3 THE COURT: All right.

4 (A chorus of thank you)

5 THE COURT: Thanks a lot. Have a great weekend.

6 (Whereupon these proceedings were concluded at 11:36

7 AM)

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C E R T I F I C A T I O N

We, Sheila Orms and Dawn South, certify that the foregoing
transcript is a true and accurate record of the proceedings.

Sheila Orms

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Date: March 27, 2017

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